

**AT&T**

Peter H. Jacoby
General Attorney

Room 3245F3
295 North Maple Avenue
Basking Ridge, NJ 07920
908 221-4243

EX PARTE OR LATE FILED

June 9, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RECEIVED

JUN - 9 1995

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Re: Policies and Rules Concerning
Unauthorized Changes of Consumers'
Long Distance Carriers, CC Docket
No. 94-129 (Ex Parte Presentation)

Dear Mr. Caton:

In connection with the above-referenced docket, I am writing to bring to the Commission's attention the recent release by the Federal Trade Commission ("FTC") of a revised notice of proposed rulemaking ("NPRM") on telemarketing fraud. A copy of the NPRM is attached.

The FTC had previously proposed rules that would have precluded businesses from using telemarketing in ways that the record there showed were not inherently deceptive or abusive, merely because certain unethical firms also made use of those practices for fraudulent purposes. In the recent NPRM, the FTC revised those proposed rules to remove certain requirements which the FTC recognized "would have had the unintended effect of impairing the ability of legitimate businesses to engage in telemarketing." The approach adopted by the FTC in the NPRM for controlling potentially misleading practices has direct application to the Commission's scrutiny of presubscription procedures in the instant docket.

As AT&T has shown in this docket, combining letters of authorization with checks in a single document that clearly and legibly provides the consumer disclosures specified by the Commission's rules is not inherently deceptive, and evidence from customers shows that consumers clearly understand they have authorized a

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carrier change by endorsing such combined instruments. Thus, just as in the FTC's telemarketing rulemaking, firms such as AT&T should not be precluded from using these nondeceptive combined instruments for legitimate purposes, even though some unethical firms may employ such documents (without the necessary customer disclosures) in a fraudulent manner.

In accordance with Section 1.1206(a)(1) of the Commission's rules, two (2) copies of this letter are being submitted to your office.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Peter H. Garley".

Attachment

FTC news

Federal Trade Commission Washington, D.C. 20580 (202) 326-2180

FOR RELEASE: MAY 31, 1995

FTC PROPOSES REVISED RULE TO BAN DECEPTIVE, ABUSIVE TELEMARKETING PRACTICES

The Federal Trade Commission has revised a telemarketing rule it proposed in February to focus more narrowly on deceptive and abusive telemarketing practices, but also to give law enforcement officials more flexibility to target the changing nature of telemarketing fraud.

The FTC is seeking public comments on the revised proposal until June 30. By federal statute, the FTC is required to promulgate the final rule by Aug. 16; it plans to make the rule effective 30 days after promulgation. Violations of the rule could result in civil penalties of up to \$10,000 per violation.

"In several ways, the revised proposal is stronger than the original one as it applies to fraudulent telemarketers," said FTC Chairman Robert Pitofsky. "At the same time, it removes a number of requirements which would have had the unintended effect of impairing the ability of legitimate businesses to engage in telemarketing," he said.

For example, the FTC has replaced the extensive list of telemarketing practices to be banned as deceptive or abusive with more general prohibitions against misrepresentations of any material aspect of the goods or services being offered. The FTC also has substantially reduced the number of disclosures a telemarketer would be required to make. The revised proposal retains other requirements and prohibitions found in the original proposal only if they provide clear consumer benefits without imposing unintended or costly burdens on legitimate businesses whose only point in common with boiler room frauds is that they both sell over the telephone, the FTC said. These changes reflect many of the suggestions made during the 45-day comment period on the initial proposal and in a public workshop-conference the FTC held in Chicago April 18-20.

- more -

The revised rule still would cover most types of telephone sales transactions where a telemarketer initiates a call to a consumer. It would exempt telemarketing calls to consumers where the transaction is completed in a face-to-face sales presentation, when the call is otherwise subject to extensive requirements under other Commission rules (such as pay-per-call services and franchises), or where the call is initiated by the consumer and is not the result of a direct mail solicitation by the telemarketer or seller. Catalog sales would remain exempt from the revised proposal's coverage, as would business-to-business sales. The revised proposal also clarifies that nonprofit entities and other entities not under the Commission's jurisdiction would be exempt.

Required Disclosures

The revised proposal would retain many of the disclosure requirements in the original proposal, but it would tie them more closely to the federal statute (the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994) and the likelihood of deceptive or abusive conduct. Other disclosure requirements would be eliminated.

Under the revised rule, a telemarketer would have to disclose the identity of the seller, the fact that he or she is making a sales call, the nature of the goods or services and, if the call is part of a prize promotion, that no purchase is necessary to win. These would have to be disclosed "promptly and clearly" during the call, rather than "at the beginning."

The revised proposal also would require telemarketers to clearly and conspicuously disclose the total costs and any material restrictions to purchase, receive or use any goods or services that are the subject of a sales offer. If a telemarketer mentions a refund, exchange or repurchase policy as part of a sales presentation, he or she would have to disclose all material aspects of each policy's terms or conditions.

Prohibited Misrepresentations

Generally, the rule would prohibit misrepresentations regarding any of the information required to be disclosed and concerning any material aspect of the performance, efficacy, nature or central characteristics of the goods or services that are being offered.

In addition to this general prohibition, the Commission has included a few specific categories of offers to which additional prohibitions against misrepresentations would apply, so as to

ensure that the rule would not be construed to exclude them. Thus, the rule also would prohibit telemarketers from misrepresenting any material aspect of a prize promotion, including the odds of winning, the nature or value of the prize, or that payment is required to receive a prize. It also would prohibit telemarketers from misrepresenting any material aspect of investment opportunities (which have accounted for about 43 percent of FTC's cases against telemarketing fraud since 1991), including misrepresentations of risk, liquidity, earnings potential or profitability.

Other Prohibited Conduct

The proposed rule would retain limits on the hours for telemarketing calls (after 8 a.m. and before 9 p.m.) and on calls to consumers who have stated they do not want to be called. It would broaden the prohibition against threats or intimidation to include a ban on the use of profane or obscene language and on repeatedly or continuously calling any consumer with the intent to annoy, abuse or harass, but would eliminate the ban on calling a consumer more than once within any three month period. Provisions that would have restricted resoliciting customers and set time limits for delivering prizes have been deleted in the revised rule, because the Commission believes that any deception associated with these activities would be banned by the general provisions prohibiting misrepresentations. Sections of the initial proposal that dealt with offers for business ventures have been deleted from the revised proposal and will be considered under the Commission's current review of its Franchise Rule.

Collecting Payment from Consumers

The revised rule would prohibit any false or misleading statement to induce any person to pay for goods or services, regardless of the payment system the consumer uses. This is a more flexible and fraud-focused provision than in the initial proposal, which would have required a telemarketer to have written authorization before taking funds from a consumer's checking, savings or similar account and would have prohibited telemarketers from directing couriers to pick up payment from consumers. The revised proposal would retain provisions prohibiting telemarketers from seeking payment from consumers until they render any credit repair services, loans, or services to recover funds lost or prizes never received in a prior telemarketing scam.

Assisting Telemarketing Fraud

The revised rule would prohibit anyone from providing substantial assistance -- this could include providing "sucker" lists, scripts or promotional materials, or appraisals of goods -- to a telemarketer when the assisting person knows or con-

(Revised Telemarketing Rule Proposal--05/31/95)

sciously avoids knowing that the telemarketer is engaged in conduct that would violate the rule and when the assistance offered is related to the committing or furthering the prohibited conduct. The revised rule also maintains the prohibition against credit card laundering.

Finally, the proposed rule retains various recordkeeping requirements to assist the FTC and State Attorneys General in enforcing it, but includes provisions that afford industry substantial flexibility to minimize any recordkeeping burden.

The Commission vote to announce the revised proposed rule for public comment was 5-0. It will be published in the Federal Register shortly. Comments should be addressed to the FTC, Office of the Secretary, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580 and, if possible, should be accompanied by a copy on computer disk.

Copies of the Federal Register notice and other documents associated with this rulemaking proceeding are available from the FTC's Public Reference Branch, Room 130, same address as above; 202-326-2222; TTY for the hearing impaired 202-326-2502. The revised proposal and all comments also are posted on the FTC's World Wide Web site on the Internet at <http://www.ftc.gov>.

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MEDIA CONTACT: Bonnie Jansen, Office of Public Affairs
202-326-2161

STAFF CONTACT: Eileen Harrington, Bureau of Consumer
Protection, 202-326-3127

(FTC Matter No. R411001)
(t-rule2)

Federal Trade Commission

**16 CFR Part 310
Telemarketing Sales Rule**

AGENCY: Federal Trade Commission.

ACTION: Revised notice of proposed rulemaking.

SUMMARY: In this document, the Federal Trade Commission ("FTC" or "Commission") issues a revised notice of proposed rulemaking to implement the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "the Act"). Section 3 of that Act directs the FTC to prescribe rules, within 365 days of enactment of the Act, prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.

DATES: Written comments must be submitted on or before June 30, 1995. Due to the time constraints of this rulemaking proceeding, the Commission does not contemplate any extensions of this comment period or any additional periods for written comment or rebuttal comment.

ADDRESSES: Six paper copies of each written comment should be submitted to the Office of the Secretary, Room 159, Federal Trade Commission, Washington, D.C. 20580. To encourage prompt and efficient review and dissemination of the comments to the public, all comments also should be submitted, if possible, in electronic form, on either a 5-1/4 or a 3-1/2 inch computer disk, with a label on the disk stating the name of the commenter and the name and version of the word processing program used to create the document. (Programs based on DOS are preferred. Files from other operating systems should be submitted in ASCII text format to be accepted.) Individuals filing comments need not submit multiple copies or comments in electronic form. Submissions should be captioned: "Proposed Telemarketing Sales Rule," FTC File No. R411001.

FOR FURTHER INFORMATION CONTACT: Judith M. Nixon, (202) 326-3173, or David M. Torok, (202) 326-3140, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:

Section A. Background

On August 16, 1994, the President signed into law the Telemarketing Act,¹ which directs the Commission to prescribe rules, within 365 days of enactment of the Act, prohibiting deceptive and abusive telemarketing acts or practices. The Commission published a notice of proposed rulemaking ("NPR") in the Federal Register on February 14, 1995.²

In response to the NPR, the Commission received over 300 comments from industry, law enforcement and consumer representatives, as well as from individual consumers and businesses.³ In general, consumers commented that the initially proposed Rule did not go far enough to stop unwanted telemarketing calls. Law enforcement officials uniformly praised the Commission's proposal for its thorough and useful treatment of the various means employed by fraudulent telemarketers to get consumers' money through deception or abuse. Finally, most industry representatives generally maintained that the initially proposed Rule unnecessarily burdened legitimate businesses, adding needless costs through overbroad proposals that failed to aim specifically at deceptive and abusive telemarketing practices.

Between April 18 and 20, 1995, staff of the Commission conducted a public workshop conference in Chicago, Illinois. Twenty associations or individual businesses, each with an affected interest and ability to represent others with similar interests, were selected to engage in a roundtable discussion.⁴ Howard Bellman served as the conference facilitator. Participants discussed various aspects of the initially proposed Rule, addressed each other's comments and questions, and responded to questions from Commission staff members. The conference was open to the public, and more than 150 observers attended. Oral comments from members of the public were invited each day, and 37 individuals spoke during the course of the

¹ 15 U.S.C. 6101-08.

² 60 FR 8313-33.

³ A list of the commenters, and the acronyms which will be used to identify each commenter in this notice, is appended to Section A of this notice.

⁴ The selected participants were: AARP, ATA, ATFA, APAC, ANA, DMA, DSA - Nev., DSA, EMA, ISA, ICTA, MPA, Monex, NAAG, NACAA, NAPA, NCL, NRF, PMAA, and USPS.

three-day conference. The entire proceeding was transcribed, and the transcript was placed on the public record.⁵

On May 3, 1995, Commission staff briefed all the Commissioners, in an open meeting, about the rulemaking process, the issues raised in the written comments and the public workshop, and stated possible approaches to address the issues commenters raised. The briefing was transcribed and the transcript was placed on the public record. The entire public record to date, including the comments, the conference transcript, and the Commission open briefing transcript is available on CD-ROM and has been placed on the Internet.⁶

Based on the Act's legislative history, the written comments received, and the information learned at the workshop conference, the Commission has decided to modify its regulatory approach in this revised proposed Rule. The Commission believes this modification is necessary to effectuate appropriately Congress' directive that the FTC in its rulemaking "develop criteria of behavior" and "issue a . . . rule [that is] flexible enough to encompass the changing nature of [deceptive] activity, while at the same time providing telemarketers with guidance as to the general nature of the prohibited conduct."⁷ The Commission's revised approach addresses many commenters' concerns that the initially proposed Rule cast too broad a net and imposed unnecessary burdens on the legitimate telemarketing industry without adequately focussing on deceptive and abusive telemarketing practices. Additionally, the revised proposed Rule addresses law enforcement concerns that the Rule needs to provide enough enforcement flexibility to reach deceptive and abusive telemarketing acts or practices currently unknown. The Commission believes additional public comment on a revised proposal will assist in producing a final Rule that most effectively prohibits deceptive and abusive telemarketing practices, while not unduly burdening legitimate businesses.

Section B of this notice discusses, on a section-by-section basis, the Commission's revised proposed Rule.

⁵ References to the conference transcript are cited as "Tr." followed by the appropriate page designation. References to comments are cited as "[acronym of commenter] at [page number]."

⁶ The FTC gopher server address is CONSUMER.FTC.GOV 2416. For World Wide Web access, the URL is GOPHER://CONSUMER.FTC.GOV:2416.

⁷ H. R. Rep. No. 20, 103rd Cong., 1st Sess. 8; S. Rep. No. 80, 103rd Cong., 1st Sess. 9 (hereinafter referred to as "House Report" and "Senate Report," respectively).

Appendix

LIST OF COMMENTERS AND ACRONYMS

<u>ACRONYM</u>	<u>COMMENTER</u>
ADS	ADS Teleservices
ADVANTA	Advanta Corp.
ALIC	Allstate Life Insurance Co.
AMCI	Allstate Motor Club., Inc.
A-MARK	A-Mark Precious Metals, Inc.
AAF	American Advertising Federation
AAAA	American Association of Advertising Agencies, Inc.
AARP	American Association of Retired Persons
ABA	American Bankers Association
ACRA	American Car Rental Association
ACA	American Cemetery Association
ADC	American Distributing Company
AMEX	American Express Company
AFSA	American Financial Services Association
AIG	American Impact Group
APN	American Publishers Network, Inc.
ARDA	American Resort Development Association
ASAE	American Society of Association Executives
ASTA	American Society of Travel Agents
ATA	American Telemarketing Association
ATFA	American Telephone Fundraisers Association
AWMI	American West Marketing, Inc. -- Barry Engels
AWMI	American West Marketing, Inc. -- Sandra Sawyer
AMERINET	AmeriNet, Inc.
ANDREWS	Andrews Satellite & Home Theater
ANN ARBOR	Ann Arbor News
APAC	APAC TeleServices
ABI	Archbold Buckeye, Inc.
AMOC	Arizona Mail Order Company, Inc.
ARA	Arizona Retailers Association
A&H	Arter & Hadden
ACB	Associated Credit Bureaus, Inc.
AAP	Association of American Publishers
AITS	Association of Independent Television Stations, Inc.
ANA	Association of National Advertisers
ATLANTA	Atlanta Journal & Atlanta Constitution
AT&T	AT&T Corp.
AUTOSCRIBE	AutoScribe Corporation
BAGGS	Baggs, Andrew
BAGWELL	Bagwell, Linda L.
BOB	Bank of Boston
BAY CITY	Bay City Times
BELLEVILLE	Belleville News-Democrat

BMCA	Beneficial Management Corporation of America
BNC	Birmingham News Company
BRADLEY	Bradley, MJP
BRANTLEY	Brantley, Lamar
BREWSTER	Brewster, The Honorable Bill K.
BFC	Brown Forman Corporation
BPIA	Business Products Industry Association
SAMPLER	Business Sampler Advertising, Inc.
BSA	Business Software Alliance
CAPITAL	Capital Press
CAPUTO	Caputo, Harriet Q.
CCA	Career College Association
CME	Center for Media Education
CHASE	Chase Manhattan Bank (USA)
CHEMICAL	Chemical Bank
CHERNIKOFF	Chernikoff, J.D.
CDI	Circulation Development, Inc
CITICORP	Citicorp/Citibank
COALITION	"Coalition" -- various companies
CPA	Colorado Press Association
CHC	Columbia House Company
COMCAST	Comcast Corporation/Jones Intercable
CA	Commercial Appeal
CBA	Consumer Bankers Association
CFA	Consumer Federation of America
CONWAY	Conway National Bank
CORNELL	Cornell Group
CMOR	Council for Marketing and Opinion Research
COX	Cox Newspapers, Inc.
CRILLY	Crilly, Thomas W.
CUCI	CUC International
DCR	Daily Court Review
DAILY NEWS	Daily News
DMBE	Department of Marketing and Business Environment, Florida International University
DMI	DialAmerica Marketing, Inc.
DMT&H	Dickinson, Mackaman, Tyler & Hagan, P.C.
DW&Z	Dierman, Wortley & Zola, Inc.
DSA-NEV.	Direct Sales Association of Nevada
DSI	Direct Sales International (2 copies of letter, 1 of comment)
DMA	Direct Marketing Association
DMSI	Direct Marketing Services, Inc.
DSA	Direct Selling Association
DIVERSIFIED	Diversified Marketing Service, Inc.
DONREY	Donrey Media Group
DOUBLEDAY	Doubleday Book & Music
DOW JONES	Dow Jones & Co., Inc.

OREGONIAN
BAUER
EDMUND
EMA
EMMONS
EQUIFAX
EHRlich
ERIE
ERNST

East Oregonian
Eddie Bauer, Inc.
Edmund Scientific Company
Electronic Messaging Association
Emmons, Ethel B.
Equifax Credit Information Services, Inc.
Ehrlich, The Honorable Robert L., Jr.
Erie Construction Mid-West, Inc.
Ernst, Michael

F&W
FedEx
FRB
FRB-SF
FINGERHUT
FLINT
FORNEY
FRANKLIN

F&W Publications
Federal Express
Federal Reserve Banks
Federal Reserve Bank of San Francisco
The Fingerhut Companies
Flint Journal
Forney Messenger Inc.
Franklin Mint

GABRIEL
GANNET
GE
GA OCA
GRA
GIBSON
GGP
GCM
GREENE
GRIDER
GROLIER
GHA
GUTHY

Gabriel, Mrs. Harry J. Jr.
Gannett Co., Inc.
GE Appliances
Georgia Office of Consumer Affairs
Georgia Retail Association
Gibson, Stewart & Jean
Gift Gallery Promotions
Good Cents Marketing
Greene, Russ
Grider, Felicia
Grolier TeleMarketing, Inc.
Group Health Association of America
Guthy-Renker

HHDM
HHMS
HAWES
HEAD
HEARST
HNM&T
HELMS
HERRERA
HERTZ
HSN
HOUSEHOLD
HFC
HII
H&H
"
HUDSON
HUNTINGTON
HUNTSVILLE

Harte-Hanks Direct Marketing
Harte-Hanks Marketing Services
Hawes Center, Inc.
Head, W.L.
Hearst Magazines
Hearst New Media & Technology
Helms, The Honorable Jesse
Herrera, Barbara
Hertz Corporation
Home Shopping Network
Household Bank
Household Finance Corp.
Household International, Inc.
Howe & Hutton, Ltd. -- March 14 comment
Howe & Hutton, Ltd. -- March 30 comment
Hudson City Savings Bank
Huntington National Bank
Huntsville Times/Huntsville News

IDAG	Idaho Attorney General
IMSP	IMS Promotions
IRC	Indiana Retail Council, Inc.
ICTA	Industry Council for Tangible Assets
IMC	InfoCision Management Corporation
INFOMALL	Infomall TV Network
IMSI	Infomercial Monitoring Service, Inc.
INSP	Inspirational Network
ISA	Interactive Services Association
IBM	International Business Machines Corporation
IFI	International Fabricare Institute
IFA	International Franchise Association
IMS	International Magazine Service of Northern California
IRL	International Readers League of Indianapolis
IH	Investment Hotlines
IA DOJ	Iowa Department of Justice
ITI	ITI Marketing Services, Inc.
PENNEY	J.C. Penney Company, Inc.
JACKSON	Jackson Citizen Patriot
RIVERS	Joan Rivers Products, Inc.
JOHNSTON	Johnston, Gloria
KALAMAZOO	Kalamazoo Gazette
KAPLAN	Kaplan, Jules
KIKENDALL	Kikendall, Thomas J.
KLEID	Kleid Company
KNIGHT	Knight Ridder
KNOXVILLE	Knoxville News Sentinel Co. - Mashburn
"	Knoxville News Sentinel Co. - Stevens
LANDMARK	Landmark Community Newspapers, Inc.
LARK	Lark In The Morning
LAURENZA	Laurenza, Joseph
LCS	LCS Direct Marketing Service
LEIBACHER	Leibacher, Philip J. (2 copies)
LENOX	Lenox, Inc.
LA TIMES	The Los Angeles Times
LOWE'S	Lowe's Studio
MPA	Magazine Publishers of America
MSSC	Magazine Subscription Sales Coalition
MRG	Marketing Response Group & Laser Co., Inc.
MARKETLINK	Marketlink
MARTIN	Martin Direct
MASTERCARD	Mastercard Int'l, Inc. & Visa USA, Inc.
MBNA	MBNA America Bank, N.A.
MCI	MCI Telecommunications Corporation
MCKNIGHT	McKnight Management Company
MELLON	Mellon Bank Corporation
MELTON	Melton, Carol A.

MM	Merchant Masters
MS	Merchant Sampler
MGCB	Merchants Gift Check Book
MGC	Merchants Golden Checks
MP	Merchants Promotions
M-I	Messenger-Inquirer
MRA	Michigan Retailers Association
MILLS	Mills, Susan
MS PRESS	The Mississippi Press
MOPA	Missouri Press Association
MORA	Missouri Retailers Association
MOBILE	Mobile Media
MPR	Mobile Press Register
MONEX	MONEX
WARD	Montgomery Ward
MMC	Moore Medical Corporation
MORSE	Morse, Larry E.
MBAA	Mortgage Bankers Association of America
MPG	MPG Newspapers
MTD	MTD Services
MURRAY	Murray Ledger & Times
MUSKEGON	Muskegon Chronicle
MUTUAL	Mutual of Omaha Companies
NAAG	National Association of Attorneys General
NACAA	National Association of Consumer Agency Administrators
NAR	National Association of Realtors
NAPA	National Automated Payment Association
NAMA	National Automatic Merchandising Association
NBR	National Bank of the Redwoods
NCTA	National Cable Television Association, Inc.
NCL	National Consumers League
NCMC	National Credit Management Corporation
NFIB	National Federation of Independent Business
NFN	National Federation of Nonprofits
NFA	National Futures Association
NNA	National Newspaper Association
NPS	National Promotional Services
NRF	National Retail Federation
NSF	National Science Foundation
NB	NationsBank
NIE	Nationwide Insurance Enterprise
NPC	Neighborhood Periodical Club
NETWORK	Network Direct
NHI	New Hampton, Inc.
NYSCPB	New York State Consumer Protection Board
NYTC	New York Times Company
NEWS	News Publishing Company
NAA	Newspaper Association of America
NIMA	NIMA International
NORDSTROM	Nordstrom

NARDA	North American Retail Dealers Association
NASAA	North American Securities Administrators Association
NYNEX	NYNEX
OHIO	Ohio Health Care Products, Inc.
OLAN	Olan Mills, Inc.
GLOBE	Old Globe
OPC	Oregonian Publishing Company
ORKIN	Orkin Lawn Care
"	Orkin Maid
"	Orkin Pest Control -- March 23 comment
"	Orkin Pest Control -- March 30 comment
"	Orkin Landscaping
PACESETTER	Pacesetter Corporation
PTG	Pacific Telesis Group
PATRIOT	Patriot News
PEPPERTREE	Peppertree Resorts, Ltd.
PLP	Personal Legal Plans
PETERSON, P	Peterson, Phyllis G.
PETERSON, R	Peterson, Rosie Marie
PPI	Phone Programs Inc.
PLAIN	Plain Dealer
	Landscaping (see Orkin)
PCI	Private Citizen, Inc. (initial letter & comment)
	Private Citizen (addendum)
PCH	Programmers Clearing House
PMMA	Promotional Marketing Association of America & Incentive Federation
PRUDENTIAL	Prudential Home Mortgage
PCH	Publishers Clearing House
PDW	Publishers Discount Warehouse - Barclay Fisher
"	Publishers Discount Warehouse - Gina Lewis
"	Publishers Discount Warehouse - J.B. Owen
"	Publishers Discount Warehouse - David Rains
"	Publishers Discount Warehouse - Jimmy Riggle
P&C	Pullman & Comley
QUICKCARD	QuickCard Systems
QVC	QVC, Inc.
RDA	Reader's Digest Association, Inc.
SEARCHLIGHT	Record Searchlight - Kjellin
"	Record Searchlight - Dawson
REGAL COMM	Regal Communications Corporation
REGAL GROUP	Regal Group
REICHWEIN	Reichwein, Kay
RPOA	Resort Property Owners Association
RPI	Resource Publications, Inc.
RICE	Rice, Rodger D. and Barbara L.
RICH	Rich, David G.

RITCHIE	Ritchie Swimwear
RMH	RMH Telemarketing
RODRIGUEZ	Rodriguez, Ann
ROLLINS	Rollins Inc. (2 copies)
RPS	Rollins Protective Services
WEBER	Ron Weber and Associates
ROTENBERG	Rotenberg, Marion
SSI	SafeCard Services, Inc.
SAGINAW	Saginaw News
SFNA	San Francisco Newspaper Agency
SEARS	Sears Merchandise Group
SIASSR	Securities Industry Association
SCIC	Service Contract Industry Council (SCIC)
SHI	Shop at Home
SHULMAN	Shulman, Betty
SIGNATURE	The Signature Group
S&S	Simpson & Simpson, P.C.
SMITH	Smith, R.
SDRA	South Dakota Retailers Association
SBTC	Southwestern Bell Telephone Company
SPIEGEL	Spiegel, Inc.
SPRINT	Sprint Corporation
STAR	Star-Ledger
SIA	Staten Island Advance
SMSI	Strategic Marketing Specialists, Inc.
STUART	Stuart News
S&W	Sullivan & Worcester
SUN	Sun Newspapers
SSE	Superstar Satellite Entertainment
SUTTON	Sutton Marketing
SYRACUSE	Syracuse Newspapers
TALK800	Talk800
TMGI	Telatron Marketing Group, Inc.
TELENATIONAL	Telenational Marketing
TCPS	Telephone Check Payment Systems
TPA	Tennessee Press Association, Inc.
TEZANOS	Tezanos, Maritza
TCI	Thomas Cook, Inc.
TIEDT	Tiedt, Thomas N.
TIMEWARNER	Time Warner
T-I	Times-Independent
TP	Times Picayune
TITUS	Titus, The Honorable Dina (2 letters)
TMG	TMG (Television Marketing Group)
TMW	TMW Marketing
TMO	Total Marketing Outbound, Inc.
TUPPERWARE	Tupperware Worldwide (2 copies)
TVMARKET	TV Marketplace, Inc.

UCI	United Color, Inc.
UPS	United Parcel Service, Inc.
USTA	United States Telephone Association
UMI	Universal Media Inc.
USD	University of San Diego, Center for Public Interest Law
USCE	U.S. Coin Exchange
	U.S. Coin Exchange (addendum)
USPS	U.S. Postal Service
USWI	US West, Inc.
VIACOM	Viacom International
VINCENT	Vincent, Chorey, Taylor & Feil
VIRGINIA	Virginia State Corporation Commission
WACHOVIA	Wachovia Corporation
WASHINGTON	The Washington Post
WAUGH	Waugh, John C.
WTO	West Telemarketing Outbound
WU	Western Union
WESTVACO	Westvaco, Corp.
WILLIAMS	Williams Television Time
WTC	Wilmington Trust Company
WILSON	Wilson Daily Times
WINCHESTER	Winchester Sun
WINDSOR	Windsor Vineyards
WINONA	Winona Post
WFNNB	World Financial Network National Bank
YOUNGBERG	Youngberg, Arthur D.

Section B. Discussion of the Revised Proposed Rule

Section 310.1 Scope of the regulations

Section 310.1 of the revised proposed Rule makes clear that this Rule does not apply to any activity excluded from the Commission's jurisdiction.⁸ Thus, pursuant to the following jurisdictional limitations set forth in Section 5(a)(2) of the Federal Trade Commission Act ["FTC Act"],⁹ this Rule does not apply to:

⁸ The Telemarketing Act states that "no activity which is outside the jurisdiction of the [FTC] Act shall be affected by this Act." 15 U.S.C. 6105(a).

⁹ 15 U.S.C. 45(a)(2).

banks, savings and loan institutions described in section 18(f)(3),^[10] Federal credit unions described in section 18(f)(4),^[11] common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in Section 406(b) of said Act.

In addition, this Rule does not apply to any entity that is not "organized to carry on business for its own profit or that of its members."¹² Finally, this Rule does not apply to any entity engaged in the business of insurance to the extent that such business is regulated by State law.¹³

Section 310.2 Definitions

The revised proposed Rule amends, adds, or deletes certain definitions. The following definitions were deleted: "business venture," "goods or services," "premium," and "verifiable retail sales price." The Commission amended the definitions of: "credit card," "credit card sales draft," "credit card system," "investment opportunity," "merchant," "merchant agreement," "prize," "prize promotion," "seller," "telemarketer," "telemarketing, and "telephone solicitation." A definition for the term "credit" was added. Each of these changes, as well as a discussion of the definition of the term "material," are discussed below.

1. Business venture. Section 310.2(a) of the initially proposed Rule defined the term "business venture" as any "business arrangement, however denominated, including . . . 'a franchise' as . . . defined in the Commission's Franchise Rule

¹⁰ Section 18(f)(3) of the FTC Act, 15 U.S.C. 57(f)(3), describes "savings associations as defined in section 3 of the Federal Deposit Insurance Act," 12 U.S.C. 1811 et seq.

¹¹ Section 18(f)(4) of the FTC Act, 15 U.S.C. 57(f)(4), describes "Federal credit unions under sections 120 and 206 of the Federal Credit Union Act (12 U.S.C. 1766 and 1786)."

¹² See 15 U.S.C. 44.

¹³ See Section 2 of the McCarran-Ferguson Act, 15 U.S.C. 1012(b).

...¹⁴ which consists of the payment of any consideration for: "(1) the right or means to offer, sell, or distribute goods or services (whether or not identified by a trademark, trade name, advertising, or other commercial symbol); and (2) the promise of more than nominal assistance . . . in connection with or incidental to the establishment, maintenance, or operation of a new business or the entry by an existing business into a new line or type of business."¹⁵ This definition came into play in Section 310.3(a)(3) of the initially proposed Rule, which prohibited sellers or telemarketers from misrepresenting important information in connection with the offer, offer for sale or sale of any business venture. In addition, the initially proposed rule, at Section 310.4(a)(8), prohibited certain abusive practices concerning the use of skills in the sale of business ventures.

The Commission's Franchise Rule contains requirements and prohibitions that apply to franchises and business opportunities. Subsequent to the publication of the NPR in this proceeding, the Commission issued a request for comments on the Franchise Rule as part of its periodic regulatory review of Commission trade regulation rules and guides.¹⁶ The Commission believes it is more appropriate to consider within the framework of that review process whether any new regulatory action is needed to address the sale of business ventures. Following this approach, the Commission ensures that any new regulatory requirement or prohibition applicable to franchises or business ventures will be codified in one regulation -- the Franchise Rule -- not spread out over two separate Rules. Accordingly, the definition of "business venture," as well as the Sections of the initially proposed Rule prohibiting misrepresentations and abusive practices described above, have been deleted from the revised proposed Rule.

2. Credit-related definitions. The initially proposed Rule defined various credit-related terms that are used primarily in Section 310.3(c) relating to credit card laundering. These terms include "acquirer," "cardholder," "credit card," "credit card sales draft," "credit card system," "merchant," and "merchant agreement." Very few commenters expressed concern about the foregoing proposed definitions, but some did suggest minor technical changes to reflect more accurately the credit

¹⁴ The term "franchise" is defined in the FTC's "Franchise Rule," 16 CFR 436.2(a).

¹⁵ 60 FR 8328.

¹⁶ 60 FR 17656 (April 7, 1995).

card industry's terminology and practices.¹⁷ Based on those comments, the Commission proposes the following changes.

The Commission proposes adding under Section 310.2(e) a definition of the term "credit" to mean "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." This definition has been added to clarify the scope of Section 310.3(c) relating to credit card laundering. It was apparent from several comments that clarification was necessary. Some commenters wanted to include all electronic payment systems under credit card laundering.¹⁸ Based on the plain language of the statute and its legislative history,¹⁹ however, Congress clearly meant to prohibit credit card laundering predicated upon the definition of "credit" used throughout the consumer credit statutes, and did not contemplate coverage of all electronic payment systems. Therefore the proposed definition of "credit" tracks the statutory definition of "credit" under the Truth in Lending Act ["TILA"],²⁰ conforming the scope of Section 310.3(c) to that intended by Congress.

Based on comments similar to those that prompted the addition of the definition of the term "credit," the Commission has modified the term "credit card" in Section 310.2(f) to make it consistent with the term as defined in the TILA, thereby explicitly limiting Section 310.3(c) to credit card laundering. The revised definition of "credit card" states: "Credit card means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit." The revised definition is identical to the statutory definition of "credit card" contained in the TILA.²¹

The Commission has revised Section 310.2(g) defining the term "credit card sales draft" to drop any reference to specific forms of records. The revised definition states: "Credit card sales draft means any record or evidence of a credit card transaction." This revision is designed to be flexible enough to anticipate future technological changes in how credit card transactions are handled. The modification is not intended to contract the range of recordkeeping formats that would be acceptable under the Rule.

¹⁷ See generally MasterCard; NAAG; USPS; NCL.

¹⁸ See, e.g., MasterCard at 5.

¹⁹ See generally House Report at 2; Senate Report at 2, 10.

²⁰ 15 U.S.C. 1603(e).

²¹ 15 U.S.C. 1603(k).

The Commission also has modified the definition of the term "credit card system" in Section 310.2(h) to address concerns Visa and MasterCard raised that the initially proposed definition could be construed to cover any system put in place, including a system put in place by a deceptive telemarketer.²² Visa and MasterCard suggested language that would preclude such an outcome by clarifying the intention to include only a credit card system to process credit card transactions involving credit cards issued or licensed by the credit card system operator. The Commission agrees with the observations and suggested language advanced by Visa and MasterCard. The revised proposed definition states: "Credit card system means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system."

In Sections 310.2(l) and (m),²³ the Commission has revised the definitions of "merchant" and "merchant agreement." In the initially proposed Rule, these definitions used the phrase "honor or accept, transmit or process credit cards in payment for goods or services." Visa's and MasterCard's comments pointed out that, according to prevailing industry usages, a merchant "honors or accepts" a credit card for payment, but does not "transmit or process" credit cards. By the same token, a merchant "transmits or processes" credit card payments, but does not "honor or accept" credit card payments.²⁴ Therefore, the language of these definitions has been redrafted to reflect more precisely these distinctions.

3. Goods or services. Many commenters expressed confusion over the scope of the definition of the term "goods or services."²⁵ The Commission initially included a definition of "goods or services"²⁶ intending to clarify that all tangible and intangible goods and services are covered under the initially proposed Rule, including leases, licenses, memberships, and certain charitable solicitations. Based on the confusion that this attempt at "clarification" engendered, the Commission has deleted the definition of "goods or services" from the revised proposed Rule. That deletion does not reflect any intention to contract the scope of coverage of the Rule; nor does it mean that

²² See MasterCard at 6.

²³ Initially proposed Rule Sections 310.2(m) and (n), respectively.

²⁴ See MasterCard at 6.

²⁵ See, e.g., IFI at 1-2; ATFA at 8-12.

²⁶ Initially proposed Rule Section 310.2(j).

any of the foregoing goods or services and similar intangible goods or services are not covered under the Rule.

4. Investment opportunity. The initially proposed Rule defined the term "investment opportunity"²⁷ to include "anything, tangible or intangible, excluding a business venture, that is offered, offered for sale, sold, or traded (1) to be held, wholly or in part, for purposes of profit or income; or (2) based wholly or in part on representations, either express or implied, about past, present or future income, profit, or appreciation."²⁸ A number of commenters suggested that this definition should be based solely on the objective test set forth in the second part of the definition; namely, the representations made by the seller.²⁹ In this way, sellers will be given clear notice that their products are covered by the Rule. These commenters believed that the first part of the definition, based on the customer's subjective intent in making a purchase, should be eliminated. The Commission agrees with this suggestion, and the revised proposed definition is now based solely on the express or implied representations about income, profit or appreciation.

The initially proposed definition also expressly stated that the term "investment opportunity" includes, but is not limited to, "any business arrangement where persons acquire, or purportedly acquire, government-issued licenses or interests in one or more businesses derived from the possession of such licenses." Upon further consideration, the Commission believes this clause is unnecessary because government-issued licenses or interests derived from such licenses are indisputably within the jurisdiction of the Commission. The Commission therefore has deleted the foregoing extraneous clause from the revised proposed Rule, but has added clarification that the definition of the

²⁷ Initially proposed Rule Section 310.2(k).

²⁸ As noted in the NPR, Sections 3(d) and (e) of the Telemarketing Act, 15 U.S.C. 6102(d) and (e), exclude from Rule coverage any of the following persons: a broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer [as those terms are defined in Section 3(a) of the Securities and Exchange Act of 1934, 15 U.S.C. 78c(a)], an investment adviser [as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-2(a)(11)], an investment company [as that term is defined in Section 3(a) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(a)], any individual associated with those persons, or any persons described in Section 6(f)(1) of the Commodity Exchange Act, 7 U.S.C. 8, 9, 15, 13b, 9a.

²⁹ E.g., ICTA at 28-30; Monex at 6; A-Mark at 2-4.

term, "investment opportunity" does not include "sales of franchises subject to the Commission's [Franchise Rule] (cite omitted)."

5. Material. Some commenters expressed uncertainty as to what specifically is meant by the term "material," as used in Section 310.2(k).³⁰ The Commission intends this term and its definition to comport with the Commission's Deception Statement and established Commission precedent. Cliffdale Associates, 103 FTC 110 (1984); Thompson Medical Co., 104 FTC 648 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 107 S.Ct. 1289 (1987); and the Commission's Deception Statement attached as an appendix to Cliffdale Associates. The Commission believes that further explanation of the term in the Rule is unnecessary given the comprehensible guidance in the cited case law and policy statement.

6. Premium. The Commission, in its revised proposed Rule, has deleted the initially proposed Rule provisions relating to premiums. The Commission believes that those deletions obviate the need to define this term. The deletion of the definition of the term "premium" and its associated provisions are not intended to be construed to eliminate from the Rule's coverage the misrepresentation of a premium's value in a telemarketing transaction.

7. Prize and prize promotion. Some modifications have been made to the initially proposed definition of the term "prize."³¹ NAAG suggested in its comment that the reference to "no obligation to purchase" should be deleted from the definition.³² NAAG pointed out that many fraudulent telemarketers seek to create the impression that consumers must purchase something in order to receive a prize, even though the promotion technically does not include such a requirement. In such cases, it may be difficult for law enforcement authorities to prove that there was "no obligation to purchase," making inapplicable the definition of "prize" and the protections the revised proposed Rule would provide for consumers with respect to prize promotions. The Commission believes this is a valid concern and, because the limiting language about an obligation to

³⁰ See generally TMW; Monex. In the initially proposed Rule, the definition of "material" was numbered Section 310.2(l).

³¹ The initially proposed Rule defined "prize" as "anything offered, or purportedly offered, to a person at no cost and with no obligation to purchase goods or services and given, or purportedly given, by chance." Initially proposed Rule Section 310.2(q).

³² NAAG at 9. See also IA DOJ at 20.

purchase is not necessary to accomplish the definition's purpose, has deleted the language from the definition.

Another concern addressed in the revised proposed Rule involves the element of chance in the definition of "prize." USPS noted that a typical deceptive prize scheme will involve a solicitation listing four or five items, with the consumer being told, without specificity, that he or she is guaranteed to receive one of them.³³ Because a consumer is "guaranteed" to receive one of the stated items, it could be construed that there is no element of "chance" involved in the offer and the item therefore is not a "prize." The Commission believes this concern should be addressed and has therefore clarified the term "chance" included in the revised proposed definition of "prize." The revised definition of the term "prize" states that "chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive."

The initially proposed Rule defined "prize promotion"³⁴ to include traditional sweepstakes or other games of chance, as well as any oral or written representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize. The currently proposed definition has been revised slightly, (Section 310.2(q) of the revised proposed Rule), to make clear that the representations about winning may be either express or implied. This addresses a concern, raised by NAAG,³⁵ that fraudulent telemarketers often artfully craft their sales pitches to avoid express representations while delivering an implied message that a consumer has won a prize.

8. Seller and telemarketer. Another definition that elicited comments was the term "seller."³⁶ Many commenters expressed the view that the definition needed clarification as to what constitutes a "seller" under the Rule, particularly with respect to its application to diversified companies or divisions within one parent organization. For example, as it explained during the workshop conference, ANA represents many members that have divisions of large diversified companies, such as Orkin.³⁷ ANA explained that in addition to pest and termite control that

³³ USPS at 3.

³⁴ Initially proposed Rule Section 310.2(r).

³⁵ NAAG at 10.

³⁶ Initially proposed Rule Section 310.2(s).

³⁷ Tr. at 666.

people are familiar with, Orkin also offers a number of other services unrelated to pests and termites.³⁸

After careful consideration, the Commission believes that the definition of the term "seller" is clear. The Commission intends that this definition encompass distinct corporate divisions as separate "sellers." The determination as to whether distinct divisions of a single corporate organization will be treated as separate sellers will depend on such factors as: (1) whether there exists substantial diversity between the operational structure of the division and other divisions or the corporate organization and (2) whether the nature or type of goods or services offered by the division are substantially different from those offered by other divisions or the corporate organization.

The term "telemarketer," included in revised Section 310.2(t),³⁹ also elicited numerous requests for clarification. The Commission believes that the definition is clear. The Commission intends that the definition of the term "telemarketer" apply to persons making a telephone call to, or receiving a telephone call from, a customer⁴⁰ in connection with or about the purchase of goods or services. It does not include persons making or receiving customer service calls or similar tangential telephone contacts unless a sales offer is made and accepted during such calls. To provide industry with further guidance as to the intended scope of the term "telemarketer," the Commission has substituted the phrase "telephone calls to" in place of "telephonic communication."

Commenters also raised concerns about whether sellers and telemarketers should be held jointly liable under the Rule for the actions of the other. The Commission finds nothing in the statute or legislative history to support the view that it is the intent of Congress to impose joint and several liability between a seller and a telemarketer. Nor does the Commission intend such a result. However, the revised proposed Rule's provisions state that a seller or a telemarketer can be held liable for violating various parts of the Rule if either engages in the prohibited acts or practices. Additionally, liability can be imposed on a seller or telemarketer for assisting and facilitating a Rule violation if either meets the standard set forth in Section 310.3(b). Therefore, although the Rule does not impose joint and

³⁸ Id.

³⁹ Initially proposed Rule Section 310.2(u).

⁴⁰ Revised Section 310.2(i) defines "customer" as "any person who is or may be required to pay for goods or services offered through telemarketing."